IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

OP.No. 27835 of 2000(L)

PETITIONER:

M/S. SABARI ROLLER FLOUR MILLS (P) LTD.,
T.C. 27/456, PALMGROOVE,
GAS HOUSE LANE, KUNNUKUZHY,
THIRUVANANTHAPURAM - 695 037,
REPRESENTED BY ITS CHAIRMAN AND
MANAGING DIRECTOR SHRI. P.B.DEVARAJAN.

BY ADV. SRI.S.EASWARAN

RESPONDENT:

THE KERALA STATE CIVL SUPPLIES
CORPORATION LIMITED,
P.B.2030, MVELI BHAVAN,
GANDHI NAGAR, KOCHI - 682 020,
REPRESENTED BY ITS MANAGING DIRECTOR.

BY ADV. SMT. MOLLY JACOB.

THE ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 04/12/2007, ALONG WITH O.P. NOS.33007 & 33008/2000, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P. NO. 46786 OF 2000 IN O.P. NO.27835 OF 2000.

DISMISSED.

4.12.2007. SD/- K.M. JOSEPH, JUDGE.

APPENDIX

PETITIONER'S EXTS:

EXT. P1 : COPY OF COMMUNICATION NO.4-1/97-DR.III DATED 18TH SEPTEMBER, 1997 ISSUED BY THE GOVERNMENT OF INDIA.

EXT. P2 : COPY OF INVITATION TO TENDER AND INSTRUCTIONS TO TENDERERS FOR CONVERSION AND SUPPLY OF WHOLE WHEAT ATTA DATED 5.10.1998 ISSUED BY THE RESPONDENT.

EXT. P3 : COPY OF COMMUNICATION NO.B2.20892 DATED 19/12/1998 ISSUED BY THE RESPONDENT.

EXT. P4 : COPY OF PROCEEDINGS NO.B2.28441/98 DATED 23.3.1999 ISSUED BY THE RESPONDENT.

EXT. P5 : COPY OF PROCEEDINGS NO.B4.2650/99 DATED 19.7.1999 ISSUED BY THE RESPONDENT.

EXT. P6 : COPY OF PROCEEDINGS NO.B4-5549/99 DATED 17.12.1999 ISSUED BY THE RESPONDENT.

RESPONDENT'S' EXTS:

EXT. R1(a) : PHOTO COPY OF THE WORK ORDER NO.125/98 DT. 24.12.1998.

EXT. R1(b) : PHOTO COPY OF THE WORK ORDER NO.1/99 DT. 23.1.1999.

EXT. R1(c) : PHOTO COPY OF THE WORK ORDER NO.27/99 DT. 19.2.1999.

K.M.JOSEPH, J.

- -

O.P. Nos.27835, 33007 & 33008 of 2000

- -

Dated this the 4th day of December, 2007

JUDGMENT

These Original Petitions raised common questions, and they are disposed of by this common judgment.

2. Petitioners in the original petitions were given the right to convert wheat into Atta. The arrangement was that wheat would be procured from Food Corporation of India, and they were to convert it to Atta and supply it to the respondent. The relevant conditions are as stipulated in Ext.P2 in O.P.33007 of 2000. The conditions, with which this court is concerned, are to be referred in some detail. Therefore, I extract Clauses 6, 8 and 18.

> "**6. Whole wheat atta** The Corporation requires the wheat lifted by the miller under this contract to be converted into 92% whole wheat atta after removing bran. The Corporation will however accept only whole wheat atta. Bran (both fine and coarse) will be retained by the miller (see clause 7). The quality of the whole wheat atta should conform to the

specification stipulated below:

Grade specifications for Whole wheat atta

Refractions	Requirements Percentage by weight
1. Moisture Maximum.	10.0
2. Total ash (on dry basis)Maximum	2.0
3. Acid insoluble ash (on dry basis) Maximum	0.07
4. Crude Fibre (on dry basis) Maximum	0.10
5. Alcoholic acidity (as H2 SO4) with 90 percent alcohol Maximum	8
6. Gluten (minimum)	100% through
7. Granularity Minimum	350 microns Steve.

The Corporation will be at liberty to reject the stock which is not as per the above specifications. However the Managing Director reserves the right to accept such stock imposing penalty for the specifications exceeding the above limits.

8. Inspection. The Corporation shall have the right to get the stock of whole wheat atta inspected in the mill premises during the processing stage itself or thereafter, its representatives shall have the freedom to draw samples and get it analysed from recognised laboratories to ascertain whether it

conforms to the specifications above.

The miller shall take a sample from each batch and get it analysed. A copy of analysis report shall be sent along with each load of that batch to the destination point, along with the vehicle.

The tenderer shall keep one packet from each load and preserve the same at his office along with the details of batch number, lorry number and date of despatch.

The AM/UM at the destination depot shall take one packet as sample from each load. The packet shall be sent to HO within24 hours of receipt of atta along with duplicate copy of GRS and copy of analysis report after noting the details of batch number, lorry number, date of despatch and the date of receipt.

If the quality is not according to the specification stipulated, the Corporation reserves the right to reject the stock and the miller shall be deemed to have neglected to deliver the products according to the contract. In such event the Corporation reserves the right to forfeit the Security Deposit as per this contract and to blacklist the miller.

18.Warranty. The miller shall be responsible and be liable free of cost to replace or reprocess the the option of the Corporation the goods supplied under this order or any part thereof that need replacing or reprocessing by reasons of any

> defects in the composition or substances or material defect in goods or packing brought to the notice of the miller within two weeks of the receipt."

The petitioners have approached this court impugning the proceedings issued by the respondent purporting to impose penalty on the petitioners. They challenged the same on various grounds. According to them, the Atta, which was supplied by them, was accepted. They would contend that Clause 6, which is relied on by the respondent, enables the Corporation to reject the supply made by the petitioners. Once the supplies made by the petitioners were accepted, it was not open to the Corporation to visit them with the imposition of penalty purporting to be under Clause 6 of Ext.P2. They were further pointed out that a perusal of the orders, which are challenged would show that there is indeed delay. According to them, under Clause 6, if penalty has to be imposed, it should have been imposed at the time when the Corporation decided to accept the supplies made by the petitioners. In other words, it is their case that Clause 6 only permits the Corporation to levy penalty, if at all at the time when the goods are accepted. Further, it is submitted that after the goods are accepted and what is more, sold in the market and without the respondent suffering any loss , it

is not open to the respondent Corporation to levy penalty purportedly under Clause 6 in the manner in which it has been done in these cases. It is pointed out that in some cases the delay is more than a year. Learned counsel for the petitioners would submit that the impugned action is palpably arbitrary. It is also submitted that the petitioners are not involved in the quantification process. They would further submit that having regard to the terms of Clause 18 extracted herein before, it was incumbent on the part of the Corporation to afford them an opportunity to replace any defective stock and in so far as such an opportunity was denied, the impugned action cannot be sustained. They would further point out Clause 8 and contended that the sample has to be taken within 24 hours and having regard to the facts of this case, it is clear that Clause 8 has also not been followed. Both counsel would submit that large amounts are due to the petitioners and they remain to be paid. Sri. Mohammed Nias would submit that having regard to the provisions contained in Section 70 of the Contract Act, the petitioners having supplied the goods and Corporation having received the benefits, it is not open to the Corporation to deny the benefits, which they have received under the contract.

3. Per contra, Smt. Molly Jacob, learned counsel appearing on behalf of the Corporation would submit that there is no merit in the contention of the petitioners. She would contend that the action is perfectly protected by the terms of Clause 6. She would submit that there is a choice between accepting with or without penalty or rejecting the supply made depending upon whether the goods supplied were in conformity with the specifications in the contract. She would submit that there were reports received and it is only on the basis of that reports that action has been taken and the action is beyond challenge.

4. On a perusal of the provisions, I would think that the petitioners may not be justified in challenging the imposition of penalty. Conditions of the contract would show that the supplies to be made by the petitioners were to be in conformity with certain prescribed criteria. There are seven criteria fixed as the specification for whole wheat atta. They include Granularity Minimum and also Moisture Maximum. It is common case that action against the petitioner for imposition of penalty is premised on their supplies not being in conformity with the requirements as against

moisture maximum and granularity minimum. It is not as if the supplies made by the petitioners were totally opposed to the grade specifications. In other words, it is not a case where the supplies made totally fell short of the requirements with regard to the seven criteria indicated in Ext.P2. Apparently, in such circumstances the Corporation did have the liberty to reject the supplies in which case the Corporation could have directed the petitioners as millers to replace or reprocess the goods supplied. I would think that the argument based on Clause 18 by the petitioners does not appear to be that warranted. Clause 18 actually enables the Corporation, at its option, to require the replacement of the material. Under Clause 6 therefore, when apparently for the reason that supplies made by the petitioners fell short of two criteria, the Corporation decided not to reject it. Apparently the Corporation has accepted the supplies made by the petitioners. The further question therefore is whether the Corporation had the duty to accept it without imposing penalty or was the Corporation within its rights in accepting it and then realising penalty. On a perusal of Clause 6, it is clear that the Managing Director had the right to accept the stock imposing penalty for specifications exceeding the limits. The fact that some

time has elapsed from the date of supply of the goods by itself in my view would not deprive the Corporation of its right under Clause 6 to visit the petitioners with a penalty on the basis of the facts present, namely, non-conformity with the criteria which are undoubtedly binding on the petitioners. It is true that the Corporation could have imposed penalty at the time they decided to accept the supplies with the penalty. But the fact that the penalty is imposed after sometime could not detract from either the validity or efficacy of the decision to impose such penalty. The petitioners are bound by Clause 6.

5. In the counter affidavit also it is stated as follows:

> "As directed in the work orders, the petitioner supplied atta to the designated depots of the Corporation. As stated in Clause 8 of Ext.P2 tender, the Asst. Manager/Unit Manager of the designated depots shall send samples from each loan to the Head office of the Corporation. Samples thus received were got analysed at M/s.Sterling Farm R& D, Cochin.
>
> The analysis reports received from M/s. Sterling Farm by the Corporation showed that almost all the loads supplied by the petitioner were not conforming to the quality specifications stipulated in Ext.P2 tender as well as in the work orders P3 analysis report produced by the petitioner is not

pertaining to the work orders in question. It relates to the previous orders. In this case the first work order was issued to the petitioner only vide work order dated 24.12.1998. The certificate of analysis at Ext.P3 is dated 23.12.1998. Ext.P3 is produced to mislead this Hon.Court. By virtue of the conditions in Ext.P2 tender, it was decided to impose penalty for variation in specification at the rate shown below:

A. For excess moisture (on actuals)

10% to 11% = 100% value cut.

11% 12% = 150% do.

12% to 12.5% = 200% do.

B. For low granularity (on actuals)

100% to 95% = 50% value cut

95% to 90% = 100% do."

6. I find favour with the contention of Smt. Molly Jacob that in order to avert a break down of the distribution system the supplies made by the petitioners came to be accepted, and the fact that penalty orders followed after some time gap should not rob the action of its validity which, it should possess in terms of Clause 6 of Ext.P2. Going by the counter affidavit, it is clear that the action was based on analysis report. According to Smt. Molly Jacob provisions of Clause 8 are enabling. Of course, the petitioners in

O.P.Nos. 33007/2000 and 33008/2000 have filed reply affidavits purporting to controvert the allegations. He would also submit that the report has to be obtained within 24 hours. I would think that having regard to the facts of this case, where it was found on the basis of the report that the supplies made by the petitioners were not in full conformity which apparently was the reason why, instead of rejecting, the Corporation decided to accept it with the imposition of penalty, it should not be open to this court to interfere with the orders. There is no provision for notice as such under the contract. When there is power and when there was a report justifying the action under the terms of the contract, it may not be open to this court to veto such a decision in a proceedings under Article 226 of the Constitution. Therefore, I would think that there is no merit in the Original Petitions and accordingly they are liable to be dismissed. But however, I make it clear that the respondent Corporation has to pay any amount remaining to be paid to the petitioners after debiting the amounts due to it under the impugned orders. Accordingly while dismissing the Original Petitions, there will be a direction that the respondent Corporation will ascertain whether any amount is to be paid to the petitioners as consideration after deducting the

amounts due to the Corporation under the impugned orders and pay it to the petitioners within a period of two months from the date of receipt of a copy of this judgment. I leave open the claim of interest by the petitioners.

(K.M. JOSEPH, JUDGE)

sb

K.M. JOSEPH, J.

O.P. Nos.27835, 33007 & 33008/2000

JUDGMENT

4.12.2007.